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CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK CONVENTION), 1958*

(Done in New York, 10 June 1958)

[Introductory remarks]

1. General. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is arguably the most successful instrument, not only in the area of private dispute resolution, but also in the area of private and commercial law in general. It has 144 Member States, the more recent additions being Cook Islands in 2009 and Rwanda in 2008. In this respect, the Convention brings together countries with very different legal cultures and levels of economic development heralding a true product of early globalisation and projecting international arbitration as one of the few, and oldest, areas of global legal practice. Although the Convention, adopted by diplomatic conference on 10 June 1958, was prepared by the United Nations prior to the establishment of UNCITRAL – the specialist United Nations Commission on International Trade Law, which started its operation in 1966 – promotion of the Convention is an integral part of UNCITRAL's work. The Convention is widely recognised as the foundation of international commercial arbitration, imposing on courts of Contracting States a public international law obligation to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognise and enforce awards made in other States, subject to specific limited exceptions. Consequently, the Convention deals with the recognition and enforcement of foreign arbitral awards, the recognition and enforcement of arbitration agreements and creates a uniform legal regime of the grounds on which enforcement of an award may be resisted. The three areas that the Convention does not cover or harmonise are left to domestic legislation and one can only hope that these systems will gradually converge. These areas are: (a) public policy, (b) what matters are capable of settlement by arbitration (arbitrability) and (c) procedure relating to recognition and enforcement of awards.

2. History and Status. In 1953, the International Chamber of Commerce (ICC) suggested a new treaty to modernise international commercial arbitration and the regime created by the Geneva Protocol of 1923 and the Geneva Convention of 1927. The old regime distinguished between enforceability of arbitration agreements and arbitration awards. The problem was the so-called double exequatur, since awards were enforceable only in the State where the

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award was made and leave for enforcement was needed in any other State. This issue is now addressed by the New York Convention that ensures enforceability of arbitration awards internationally. The ICC proposal was taken up by the United Nations Economic and Social Council (ECOSOC) and led to the adoption of the New York Convention of 1958. The Convention entered into force on 7 June 1959. The current status of ratification may be found at the UNCITRAL website and specifically at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>. The preparatory documents (*travaux préparatoires*) of the Convention which may well have a bearing on its (historical) interpretation are available from <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY Convention_travaux.html>.

3. Sources. Despite the great popularity of the Convention there are fairly few books published on the topic in English. A few publications can be referred to in the context of this concise commentary:

- Marc Blessing (ed.), *The New York Convention of 1958. A Collection of Reports and Materials* delivered at the ASA Conference held in Zürich on 2 February 1996, ASA 1996
- Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards. The New York Convention of 1958* (Cameron May 2001)
- Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards. The New York Convention in Practice* (Cameron May 2008)
- Giorgio Gaja (ed.), *New York Convention* (Oceana, 1978-1996)
- Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability. International and Comparative Perspectives* (Kluwer 2009)
- United Nations (eds.), *Enforcing Arbitral Awards under the New York Convention. Experience and Prospects* (1999)
- Albert Jan van den Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (Kluwer 1981)
- Albert Jan van den Berg, *Consolidated Commentary on New York Convention*, part of ICCA Yearbook but also available at <www.kluwerarbitration.com>, since 1976.

[Scope of Application]

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term 'arbitral awards' shall include not only awards made by

arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

1. Scope of Application: the Territorial Criterion. The Convention determines its scope of application by adopting a 'territorial criterion'. It applies to arbitral awards rendered in a State other than the State where recognition and enforcement are sought. During the negotiation of the Convention, it was considered whether other alternative criteria based on traditional conflict of laws elements should be adopted in order to determine which awards should fall within the scope of application of the Convention. Eventually, the territorial criterion was adopted because it allowed for an objective standard that was in line with the degree of detachment from domestic laws, which international arbitration is generally believed to be entitled to.

2. Qualification of the Territorial Criterion. In order to pursue the Convention's general pro-enforcement bias, it was agreed that it would be desirable to allow the application of the Convention to arbitral awards that – by strict application of the territorial criterion – would be outside of the Convention's scope. This was considered as a necessary step to protect the enforcement of arbitral awards rendered in the country of recognition and enforcement which, because of factual or legal circumstances, are characterised by a degree of detachment from that jurisdiction. The determination as to which arbitral awards should not be considered as 'domestic awards' was left to the legislation of the State where recognition and enforcement are sought. In this way the Convention allows for delocalised or denationalised arbitration and the recognition and enforcement of awards rendered under such regimes.

3. Definition of Arbitral Awards. Interestingly, the Convention does not provide a definition of the term 'award'. This is not a moot issue since it cannot be assumed that any means of dispute resolution other than domestic court proceedings should per se qualify as 'arbitration' under the Convention. Similarly, it should not be taken for granted that any orders issued by an arbitral tribunal could be enforced under the New York Convention. It is submitted that to be within the scope of the Convention an arbitral award should (i) be issued in a means of dispute resolution genuinely alternative to the jurisdiction of domestic courts (the so-called 'alternativity test') and (ii) finally settle one or more of the issues submitted to the jurisdiction of an arbitral tribunal (the so-called 'finality test').

4. Reservations. One of the main tools for the Convention's undeniable success, is the fact that it allows Contracting States to 'mould', at least to a certain extent, the Convention's provisions to avoid any clash with the core principles of each Contracting State's domestic law. One example of this can be found in the two reservations available to Contracting States under art. I.

5. Reciprocity Reservation. The first reservation allows Contracting States to limit the application of the Convention to awards made in another Contracting State. Therefore, an award made in a non-Contracting State would not benefit from enforcement under the Convention in a State which has adopted this reservation. Seventy States have made a reciprocity reservation. Nowadays this reservation has lost much of its significance because of the widespread adoption of the Convention (in 144 States).

6. Commercial Reservation. The second reservation allows Contracting States to limit recognition and enforcement to awards relating to commercial relationships, either contractual or not. This reservation was made available in order to facilitate the signing of the Convention by countries whose national legal systems only allowed referral to arbitration of commercial disputes. In fact, forty-four States have made use of this reservation. The test as to whether a matter is to be considered as a 'commercial' one is to be carried out by using the law of the place where enforcement of the award is sought. In practice, the commercial reservation has given rise to few isolated problems even though its potential in this regard is much higher than that of the reciprocity reservation. One notable example is the US case *BV Bureau Wijsmuller* where a US District Court considered the salvage of a US warship outside the scope of the Convention as such activities are normally considered as 'non-commercial' in international law. Some domestic courts of States that have adopted the commercial reservation have at times adopted a rather narrow interpretation of their own notion of 'commercial'. In *Societè d'Investissement Kal*, the Tunisian courts were called upon to deal with a dispute between a company and two architects that had been retained to draw up urbanisation plans for a resort. The contract contained a clause referring all disputes to ICC arbitration in Paris. A dispute arose concerning the payment of outstanding fees and an ICC arbitral tribunal rendered an award in favour of the architects. The architects sought enforcement of the award in Tunisia, where the Court of Appeal confirmed the lower court's decision and denied enforcement. The Court of Appeal explained that Tunisia had adopted the commercial reservation and architectural and urbanisation works were not commercial matters under Tunisian law. The Supreme Court upheld the decision of the Court of Appeal. It is important to stress, however, that the majority of domestic courts seem prepared to construe the commercial reservation rather narrowly. An example of such approach is a much quoted case entertained by the courts of India in *RM Investment & Trading Co*. The local High Court had held that the rendering by a company of consultancy services for promoting a related commercial deal should not be regarded – pursuant to